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No. 98-

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

LINCOLN HERBERT

Petitioner

v.

ROBERT J. REINSTEIN, DEAN
TEMPLE UNIVERSITY SCHOOL OF LAW
AND VICE PRESIDENT OF TEMPLE UNIVERSITY;
TEMPLE UNIVERSITY SCHOOL OF LAW;
&
TEMPLE UNIVERSITY

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a civil rights action challenging an administrative decision accrue before the decision of the administrative tribunal is final?

2. May a state university disciplinary tribunal impose forced submission to psychiatry as a punishment for a student's "lying"?

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PETITION FOR WRIT OF CERTIORARI

Lincoln Herbert ("Petitioner") respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Third Circuit is unpublished. It is attached hereto as Appendix A. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 976 F.Supp. 331 (E.D.Pa. 1997). The District Court opinion is attached hereto as Appendix B.

JURISDICTION

The judgment of the Third Circuit was entered on June 5, 1998. Appendix D. Mr. Herbert's petition for rehearing was denied on September 17, 1998. Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1251.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case was brought under the Civil Rights Act, 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

> equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relieve shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Mr. Herbert contested the psychiatric punishments imposed upon him, in part, under the "Hatch Amendment," 20 U.S.C. § 1232h:

> **§1232h. Protection of pupil rights**
>
> (a) Inspection of instructional materials by parents or guardians
>
> All instructional materials, including teacher's manuals, films, tapes, or other supplementary material which will be used in connection with any survey, analysis, or evaluation as part of any applicable program shall be available for inspection by the parents or guardians of the children.
>
> (b) Limits on survey, analysis, or evaluations
>
> No student shall be required, as part of any applicable program, to submit to s survey, analysis, or evaluation that reveals information concerning --

(1) political affiliations;
(2) mental and psychological problems potentially embarrassing to the student of his family;
(3) sex behavior or attitudes;
(4) illegal, anti-social, self-incriminating and demeaning behavior;
(5) critical appraisals of other individuals with whom respondents have close family relationships;
(6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers; or
(7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program),

without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

(c) Notice

Educational agencies and institutions shall give parents and students effective notice of their rights under this section.

(d) Enforcement

The Secretary shall take such action as the Secretary determines appropriate to enforce this section, except that action to terminate assistance provided under an applicable program shall be taken only if the Secretary determines that --

(1) there has been a failure to comply with such section; and

(2) compliance with such section cannot be secured by voluntary means.

(e) Office and review board

The Secretary shall establish and designate an office and review board within the Department of Education to investigate, process, review, and adjudicate violations of the rights established under this section.

This case also involves the provisions of Temple Law School's administrative Code of Student Conduct (hereafter, "Code"), relevant portions of which appear in Appendix E.

STATEMENT OF THE CASE

When Lincoln Herbert defended himself from a mugging on the Temple Law School campus on May 5, 1994, he could not have imagined the Kafkaesque events which were to follow. Instead of being protected by the school as the crime victim which he was, Mr. Herbert was subjected to a disciplinary hearing at which he was found guilty of lying to the dean of the law school about this incident. He was suspended for 2-½ years and was subjected to psychiatric punishment. He has since passed a polygraph examination, Appendix H, 55a-56a. The psychiatrist who examined Mr. Herbert wrote, "Mr. Herbert manifested no clinical evidence of mental illness. Moreover, no basis was found for the requirement of a psychiatric examination . . ." Appendix I, 59a. The procedural obstacles which are the subject of this Petition have overwhelmed the serious substantive issues raised in Mr. Herbert's Amended Complaint. Only this Court stands between Mr. Herbert and injustice.

Third-year law student Lincoln Herbert was accused and was found guilty of lying to Robert J. Reinstein, the Dean of Temple Law School, about being mugged outside the law school during final examination week in May, 1994. Specifically, the Dean told Mr. Herbert that he believed Mr. Herbert had lied about his assailant's saying that he had a knife and about his assailant's reaching into his coat as if reaching for a knife. Consequently, the Dean referred Mr. Herbert to Temple Law's Disciplinary Counsel, who instituted disciplinary proceedings.[1]

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[1] The Dean also summarily suspended Mr. Herbert. Mr. Herbert challenged his initial suspension by filing a lawsuit in the United States District Court for the Eastern District of Pennsylvania on September 21, 1994. This lawsuit has been fully litigated.

On October 3, 1994, Temple Law's Discipline Committee found Mr. Herbert guilty of "communicat[ing] to a member of the Faculty or Administration serious falsehoods concerning the official business of the law school." Appendix F, 48a-50a. Following two days of penalty hearings, the Discipline Committee proposed on October 17, 1994 that Mr. Herbert be suspended for 2-½ years, undergo 100 hours of psychological counseling, and perform 100 hours of community service. Appendix F, 48a-50a.

Mr. Herbert directly challenged the findings and recommended punishments by following the Code's direct review procedures. Appendix E, 42a-47a. At the first stage of direct review, the Law School Review Panel significantly modified the penalties recommended by the Discipline Committee. The Review Panel vacated the punishment of 100 hours of psychological counseling, but replaced it with a psychiatric punishment. The Review Panel required Mr. Herbert, at his own expense, to undergo complete psychiatric evaluation and appropriate treatment, if any, as recommended by the examining psychiatrist. The Panel otherwise affirmed the findings and recommendations for punishment. Appendix G, 51a-54a.

Because the recommended sanctions included suspension, the Code required that Mr. Herbert's case be automatically heard by the Plenary Faculty before the punishments could become final. Section VI.D.(8)(a), Appendix E, 46a. On January 18, 1995, Mr. Herbert was officially notified that the Plenary Faculty vacated the community service punishment, but otherwise decided to impose the 2-½ year suspension and psychiatric punishment. The completion of the review process by the Plenary Faculty made the administrative verdict and punishments "final" pursuant to the Code.

Mr. Herbert filed the instant lawsuit on January 21,

1997. As the Third Circuit noted,[2] this filing would have been timely had Mr. Herbert's action accrued on January 18, 1995, the date that he was notified of the finalization of punishments by the Plenary Faculty. Defendants responded to the Complaint by filing a Motion for F.R.C.P. 11 sanctions. Mr. Herbert answered that Motion by filing a four-count Amended Complaint. Defendants reasserted their F.R.C.P. 11 Motion to Mr. Herbert's Amended Complaint. Following Mr. Herbert's Answer to the Motion, Defendants' Reply and Mr. Herbert's Rebuttal, the District Court denied the Motion for Sanctions, but considered the Motion as one to dismiss under F.R.C.P. 12(b)(6).

On August 22, 1997, the District Court filed an Opinion which held that three of the four counts of the Amended Complaint were untimely and that three of the counts were barred by collateral estoppel/res judicata. The District Court found that under *Delaware State College v. Ricks*, 449 U.S. 250 (1980), Mr. Herbert's action accrued on October 17, 1994, the date on which the Discipline Committee announced its recommended punishments and communicated them to Mr. Herbert. The District Court reasoned that because Mr. Herbert complained about the finding of guilt and the punishments imposed upon him, the violations of Mr. Herbert's civil rights occurred when Mr. Herbert first heard the Discipline Committee announce its recommended punishments. Appendix B, *Mem. Op.*, 18a-19a.

In an unpublished Memorandum Opinion, the Third Circuit affirmed. The Third Circuit relied upon *Ricks* and *Morse v. University of Vermont*, 973 F.2d 122 (2d Cir. 1992) for the proposition that internal administrative reviews have no effect upon statutes of limitations in civil rights cases. Appendix B, *Mem. Op.* at 6. Neither the Third Circuit nor

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[2] Appendix A, 5a, 3d Circuit *Mem. Op.*, n.2.

the District Court addressed the finality issue.[3]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHAT GOVERNS CLAIM ACCRUAL DATES FOR CHALLENGES TO ADMINISTRATIVE DECISIONS: "FINALITY" OR "NOTICE."

1. Introduction

The Circuit Courts of Appeal are split in applying this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980) to accrual of civil rights actions for statute of limitations purposes when the Plaintiff's civil rights are violated by administrative actions. Because *Ricks* involved a college professor denied tenure, the case has been applied extensively to employment and tenure cases. In such cases, however, finality, and therefore, the date of accrual, is usually not difficult to determine. As in *Ricks*, upon denial of tenure at most colleges and universities, a one-year termination contract is offered. The D.C., Seventh and Ninth Circuits have held that *Ricks* requires administrative decisions to be "final" in order to start the period of limitations. Other than the Third Circuit in this case, the Second and the Sixth Circuits have held not only that finality is not required, but that waiting for finality is prohibited by *Ricks*. Petitioner requests this Court to resolve this conflict.

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[3] The Third Circuit declined to address the res judicata/collateral estoppel issues with regard to Counts 1, 2 and 4 of the Amended Complaint. *Mem. Op.*, Appendix A, 7a, n.5. Consequently, those issues are not addressed in this Petition for Writ of Certiorari.

2.
This Court's Decision in *Ricks*

Professor Ricks, the plaintiff in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), was a black Liberian who joined the Delaware State College faculty in 1970. In February, 1973, the Faculty Committee on Promotions and Tenure recommended that he not receive tenure, although the Committee agreed to reconsider its decision the following year. In 1974, when it reconsidered its decision, the Committee adhered to its prior recommendation. *Id.* at 252. In March, 1974, the Faculty Senate voted to support the recommendation. On March 13, 1974, the College Board of Trustees voted to deny tenure to Professor Ricks. *Id.* Thereafter, Professor Ricks filed a grievance with the Board's Educational Policy Committee, which ultimately denied the grievance. *Id.*

Professor Ricks sued the College and various administrators, alleging discrimination on the basis of national origin in violation of Title VII and 42 U.S.C. § 1981. The College moved to dismiss on the grounds that the claims were barred by Delaware's three-year statute of limitations. The District Court granted the motion. On appeal, the Third Circuit reversed, holding that, for policy reasons, the last day of employment should begin the period of limitations. *Id.* at 255-256.

In reversing the Third Circuit, this Court concluded that a civil rights action accrues, and the period of limitations begins to run, when (1) a discriminatory decision is made, and (2) the plaintiff is notified of that decision in writing. *Id.* at 259. In determining when the decision (i.e. the denial of tenure) was made, the Court noted that the grievance procedure did not delay the start of the limitations period.

The Third Circuit in this case and those circuits

applying the "notice" test failed to appreciate the concept of "finality" embedded in this Court's holding in *Ricks*:

> The June 26 letter itself characterized that [the denial of tenure] as the Board's "official position." *Id.* It is apparent, of course, that the Board in the June 26 letter indicated a willingness to change its prior decision if Ricks' grievance were found to be meritorious. But entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made.
>
> As to the latter argument, we have already held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period. [Citation omitted].

Id. at 261.

Implicit in this holding is the requirement that the decision alleged to be discriminatory is final, not tentative. Hence, where an institution's internal procedures allow direct review before a decision becomes final, the statute of limitations does not begin to run until the direct review process concludes.

In contrast to the grievance procedure identified in *Ricks*, Temple's internal disciplinary procedures in this case **required** the Plenary Faculty to approve the punishments, which included suspension, before they could become "final."

Appendix E at 46a. Mr. Herbert availed himself of the direct review was able to modify the decision before it became "final." The review was therefore direct, not collateral, because it came before, not after, the final decision. Until Plenary Faculty approval, the finding of guilt and recommendations for punishments were "tentative."

The circuits are deeply divided about when civil rights cases accrue where litigants are enmeshed in administrative proceedings. Some circuits require that an administrative decision be "final" before the statute of limitations starts to run; other circuits begin the statute of limitations clock when a litigant first receives "notice" of a discriminatory act. By granting certiorari and reversing the Third Circuit in this case, this Court can clarify the issue of accrual as it relates to ongoing administrative proceedings and further the goals of fairness and judicial economy.

3.

The D.C., Ninth and Seventh Circuits Require Finality.

A.

D.C. Circuit

In *Harris v. Ladner*, 127 F.3d 1121 (D.C. Cir. 1997), the United States Court of Appeals for the District of Columbia Circuit interpreted *Ricks* to require a final decision of an administrative body before a civil rights action accrued and the period of limitations commenced. There, Mary Harris applied for and was denied promotion to associate professor at Howard University, a private institution.

Notice of the denial was given in a letter dated October 31, 1991. *Harris*, supra at 1122. Professor Harris resubmitted her tenure application as prescribed in the University's policy manual on tenure applications. *Id.* By letter dated March 25, 1992, the dean notified Professor Harris that the recommendation to deny tenure was unchanged. *Id.*

On March 24, 1995, Professor Harris filed a complaint in the United States District Court for the District of Columbia, alleging "(1) race discrimination in violation of 42 U.S.C. §1981, (2) violation of equal protection and due process under the fifth and fourteenth amendments, (3) breach of contract, (4) tortious violation of a common law right of "fair procedure," and (5) tortious interference with contract." *Id.* at 1123. The District Court dismissed the complaint, relying on *Ricks*. It held that Professor Harris' cause of action had accrued when she was first notified of the decision by the October 31, 1991 letter, thus triggering the three-year statute of limitations. The District Court reasoned that the resubmission of her application was a form of "collateral review" which, according to *Ricks*, did not alter the finality

of the October 31 decision. *Id.*

On appeal, the D.C. Circuit reversed. Again, relying on *Ricks*, the Circuit Court first determined the precise discriminatory act complained of and when it occurred. In its analysis, the Circuit Court determined that the resubmission process was not a collateral attack on a final decision. Rather, under the University's own guidelines, resubmission was part of the tenure application process before a final decision on tenure was made, separate and apart from the University's grievance procedure that applied only after a final decision was made. *Harris*, supra at 1124. The Circuit Court's decision was, in its view, entirely consistent with this Court's decision in *Ricks*:

> Our disposition of this case does not disturb or undercut the holding in *Ricks* that the 'existence of careful procedure to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made.' [quoting *Ricks*] **Rather, our holding is restricted to Harris's allegations regarding the reconsideration process afforded her, which process, although termed "reconsideration," does not appear to be like the collateral review at issue in *Ricks*. Rather, under the University's procedures as set forth in its Guidelines and conceded at oral argument, the reconsideration provided Harris appears to occur only prior to the final tenure decision**. [Emphasis supplied].

Id. at 1125.

B.
Ninth Circuit

The Ninth Circuit also requires finality of administrative decisions before commencing the period of limitations in civil rights cases. In *McCoy v. San Francisco*, 14 F.3d 28 (9th Cir. 1994), *cert. den.*, 117 S.Ct. 2481 (1997), the City began disciplinary proceedings against a police officer. The Police Commission held disciplinary hearings on May 7, June 5, and August 29, 1990. *Id.* at 29. At the end of the August 29, 1990 hearing, the Commission stated orally its decision to suspend the officer. The Commission then issued a written decision on September 13, 1990 in accordance with its procedures. *Id.* The police officer sued for violation of his civil rights. He filed his complaint on September 3, 1991, timely if the discriminatory act were the written decision, untimely if it were the oral notice. The District Court dismissed the case with prejudice on other grounds and without prejudice as to the statute of limitations. The officer filed an Amended Complaint, which was dismissed as untimely. *Id.*

On appeal, the Ninth Circuit reversed. After noting that *Ricks* governed the issue in the case, the Court analyzed the oral and written decisions in the context of the Police Commission practice. Ultimately, the Court held that the oral notice was not "final" and could not start the limitations period:

> We conclude that the written decision rather than the oral decision triggered the statute of limitations. Although McCoy "knew" of the Commission's decision at the conclusion of the August 29 hearing, he also knew that the Commission would issue a more detailed written decision. The written decision supplied the rationale of the Commission,

> addressed the defenses raised by McCoy, and set the dates of the suspension. The written decision clearly was the "final decision" that triggered the applicable statute of limitations.

Id. at 30.

C.
Seventh Circuit

The Seventh Circuit also interprets *Ricks* to require a final decision to begin the period of limitations. In *Lever v. Northwestern University*, 979 F.2d 552 (7th Cir. 1992), *cert. den.*, 508 U.S. 951 (1993), Professor Janet Lever sued the University, claiming she was discriminated against when she was denied tenure. There, the Dean notified Lever of his "recommendation" that she not be offered tenure on May 5, 1980. Subsequently, Professor Lever appealed and the Provost issued his "final decision" on February 12, 1981. *Id.* at 553. The University's faculty handbook set forth the tenure process. According to the handbook, the Dean of the college would send a "recommendation" to the Provost, which would become final unless an appeal was filed within a certain period. *Id.* at 554. Lever's complaint was timely if the Provost's decision was the discriminatory act; untimely if it was the Dean's "recommendation." *Id.* at 553. The District Court held that, based on the facts of the case, the Dean's decision was final and the period of limitations commenced on the date of his recommendation.

Judge Easterbrook, writing for the Circuit Court, noted that when a discriminatory act occurs is a question of fact. *Id.* at 553. He then reviewed the District Court record, which showed that the faculty handbook was ambiguous and did not reveal the identity of the final decision-maker on tenure, the Dean or the Provost. The testimony in the District Court

revealed that, under the University's practice, the Dean's "recommendation" was a final decision, which was subject to change by the Provost. Judge Easterbrook also noted that Lever knew the Dean's recommendation was final and even characterized the Dean's letter as the discriminatory act in her E.E.O.C. complaint. *Id.* at 554-555. Thus, the Circuit Court held that the decision of the District Court was not clearly erroneous and the decision was affirmed. *Id.* at 557.

4.
The Second, Third, and Sixth Circuits Do Not Require Finality Under *Ricks*

The Second, Third and Sixth Circuits have decided limitation questions relying on *Ricks* and do not require a "final" decision to begin the period of limitations. Indeed, these courts do not even analyze the finality question.

A.
Second Circuit

The Second Circuit has held that internal administrative reviews have no effect on the period of limitations. In *Morse v. University of Vermont*, 973 F.2d 122 (2d Cir. 1992), a masters degree candidate was dismissed after failing to complete her course work in the required time. The University did, however, offer to readmit her in another masters program under certain conditions. The conditions were not acceptable to the candidate and the offer of readmission was withdrawn. *Id.* at 124.

After her administrative appeals were denied, the candidate sued, claiming that she was disabled and that the University failed to accommodate her disability. The District Court dismissed the case as untimely and the Second Circuit affirmed. The Second Circuit did not analyze the University procedures to determine when the decisions to terminate or withdraw readmission became final. Instead, the Court blindly followed *Ricks* and measured the limitations period from the time of the notices of dismissal and withdrawal of readmission. *Morse*, supra at 125.

B.
Sixth Circuit[4]

The Sixth Circuit also focuses upon the "notice" aspect of *Ricks*. Under the "notice" interpretation, the limitations period commences once the plaintiff knows or has reason to know of a potential injury which might form the

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[4] For unknown reasons, many Sixth Circuit Opinions are not published in the Federal Reporter. The cited opinions are not so much offered for precedential value as they are to illustrate how the Sixth Circuit has decided *Ricks* issues.

basis of his complaint, even if the injury might never occur.

In *Blackwell, Inc. DBA Kuka's Place v. Kenneth Fischer*, U.S. Court of Appeals for the Sixth Circuit (No. 92-4203, November 8, 1993)(1993 U.S. App. LEXIS 29295), for example, the Court held that a claim was time-barred under Ohio's two-year statute of limitations. There, the legislature passed a law by special option election on November 9, 1989, which had the effect of revoking Blackwell's liquor license. Blackwell challenged the validity of the statute in the Ohio courts. In October, 1991, Blackwell's challenge failed. Ultimately, in an unrelated action, the Sixth Circuit found the statute unconstitutional on its face, after which Blackwell filed his complaint alleging violation of his civil rights. The Court dismissed the civil rights case as untimely and the Sixth Circuit upheld the dismissal:

> It is well-settled in this court that 'the statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action.'. . . In determining when the cause of action accrues in section 1983 actions, we have looked to what event should have alerted the typical lay person to protect his or her rights.
>
> 1993 U.S.App. LEXIS 29295*4, citing *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991).

The deficiencies in the "notice" analysis are apparent, even to the Sixth Circuit, when applied to a set of facts that compel a contrary result. In *Dunleavy v. Local 1617, United Steelworkers of America*, 814 F.2d 1087 (6th Cir. 1987), for example, the court refused to dismiss a claim of an individual steelworker under the Labor Management Reporting and

Disclosure Act ("LMRDA"). The steelworker alleged that his employer had disciplined him in retaliation for his political views and, in accordance with the union's constitution, pursued optional administrative remedies before filing the federal action. The District Court held the complaint was time-barred. The Sixth Circuit reversed, holding that the statute of limitations was tolled in that case, but only on a narrow policy exception applied to LMRDA cases. *Id.* at 1091 n. 2. The Court's analysis, however, points out the tenuous rationale for relying on "notice" alone in virtually all other types of cases:

> The Union's position would seem to require one placed in Dunleavy's situation to file a lawsuit which would become superfluous in the event of favorable Convention action simply as a matter of protection. In addition to other practical objections to such filings, we feel constrained to point out that we would be loath to require further cluttering up the docket of the overburdened federal judicial system for such a contingent purpose.
>
> *Dunleavy*, 814 F.2d at 1091.

5.
The Present Case Would Be Decided Differently In Various Circuits

The present case demonstrates the danger in the competing interpretations of *Ricks*. While notice and finality are coterminous in many cases, they are not necessarily so intertwined. In the present case, Mr. Herbert was notified on October 17, 1994 of the punishment recommendations of the Discipline Committee. Appendix F. Mr. Herbert challenged the punishments on direct review and was able to obtain modification of them. The punishments became final under

Temple's administrative procedures when he was notified of the Plenary Faculty's approval of them, i.e., January 18, 1995. The D.C., Ninth and Seventh Circuits would have held that the limitations period began on this date, and that Mr. Herbert's complaint, therefore, was timely. The Second Circuit would probably have agreed with the Third Circuit's holding in this case that the statute of limitations commenced running on October 17, 1994, and that the complaint was untimely. The Sixth Circuit would probably have agreed on the accrual date, unless school disciplinary proceedings merited a special exception similar to that granted to union administrative proceedings in *Dunleavy*, supra.

Petitioner urges this Court to adopt the "finality" rule applied by the D.C., Ninth and Seventh Circuits. By so doing, this Court will not only correct an injustice, but will also further sound judicial policies.

6.
Adoption of The "Finality" Rule is Important to Sound Judicial Policy.

The Third Circuit's application of *Ricks* to this case encourages litigants not only to abandon administrative procedures in favor of Federal lawsuits, but practically requires them to do so. Almost all non-criminal disciplinary proceedings, such as employment termination proceedings, tenure hearings and the like, require that notice of the proceeding be given to the subject of the hearing. Where counsel must determine whether such notice is a "final" notice, or whether the administrative hearing is "direct" or "collateral," counsel will take the prudent route of filing a federal action in order to preserve the client's rights.

Worse yet, suits can and will be filed after administrative proceedings have begun and/or while direct administrative appeals are pending. Clients will be

encouraged to abandon such procedures as soon as an inkling of an adverse decision occurs. The burden that this interpretation of *Ricks* places on limited judicial resources is easily eliminated: This Court can draw a bright line by holding that all potential federal litigants who claim that their civil rights are violated by administrative decisions must exhaust direct administrative appeals prior to instituting federal civil rights lawsuits. Such direct administrative appeals do not include "grievance procedures." A steadfast requirement to exhaust direct administrative appeals encourages the orderly disposition of administrative processes while, at the same time, prevents unnecessary burdens imposed by prosecution of "protective" or unripe federal litigation.

II. A STATE UNIVERSITY MAY NOT USE FORCED SUBMISSION TO PSYCHIATRY AS A DISCIPLINARY PUNISHMENT.

Count 2 of Mr. Herbert's Amended Complaint contested the psychiatric punishment which was imposed upon him for "lying" to the law school Dean. In addition to finding that this count was untimely, the District Court also ruled that the Hatch Amendment, 20 U.S.C. § 1232h, was not intended to benefit Mr. Herbert. The District Court, however, ignored Mr. Herbert's other claims noted above. Mr. Herbert pleaded that psychiatric punishment was illegal, and that it unlawfully imposed a stigma on him, depriving him of his liberty interest in his good reputation for sound mental health.

The psychiatric sanction which Temple imposed upon Herbert was not enumerated in Temple's Code. See Appendix E at 38a-39a for a list of permissible sanctions. In addition, such sanction was unsupported by any evidence that Herbert's conduct was indicative of a serious psychological or psychiatric disorder. No member of the Discipline Committee had a psychiatric or psychological background. Thus, Mr.

Herbert was diagnosed by laymen. Had a "diagnosis" such as this one occurred outside the context of a school disciplinary proceeding, such would constitute the practice of psychiatric medicine or psychology without a license.[5]

As this Court has ruled in *Addington v. Texas*, 441 U.S. 418 (1979), the deprivation of a liberty interest requires a showing that the individual subjected to psychiatric care "suffers from something more serious than is demonstrated by idiosyncratic behavior" or "a few isolated instances of unusual conduct." *Id.* at 427. Despite the absence of any evidence that Herbert's actions were a function of a psychiatric or psychological disorder, Temple's Discipline Committee determined, for unstated reasons, that psychological treatment, later modified to psychiatric evaluation and treatment, was an appropriate punishment. This arbitrary and capricious extension of the state's power to impose psychiatry as a punishment warrants this Court's attention.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be granted.

PAUL, REICH & MYERS, P.C.

BY:_____
RICHARD P. MYERS

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[5] See Pavela, *Therapeutic Paternalism and the Misuse of Mandatory Psychiatric Withdrawals on Campus*, 9 Journal of College & University Law 101, Vol. 2 (1982). This article discusses the justified "longstanding judicial distrust of psychiatric labeling." *Id.* at 126.

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97- 1795

LINCOLN HERBERT.
Appellant

v.

ROBERT J. REINSTEIN, DEAN OF TEMPLE UNIVERSITY SCHOOL OF LAW AND VICE-PRESIDENT OF TEMPLE UNIVERSITY; TEMPLE UNIVERSITY SCHOOL OF LAW; TEMPLE UNIVERSITY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-00457)
District Judge: Honorable Clarence C. Newcomer

Submitted under Third Circuit LAR 34. l(a)
Thursday, May 21, 1998

BEFORE: ROTH, McKEE
and GARTH, Circuit lodges

(Filed: June 5, 1998)

MEMORANDUM OPINION OF THE COURT

Garth, Circuit Judge,

Appellant Lincoln Herbert ("Herbert") brings this appeal after the district court dismissed his amended complaint against Temple University, Temple University School of Law ("the Law School"), and Robert Reinstein ("Reinstein"), the Dean of the Law School (hereinafter, collectively referred to as "Temple") for alleged violations of his civil rights and for allegedly breaching its contract with him when it suspended him from the Law School. For the reasons outlined below, we affirm.

I.

This case arises against the backdrop of a previous litigated dispute among the same parties. Herbert was a student at the Law School. On May 3, 1994, he was involved in an altercation with a homeless man in which Herbert ultimately sprayed the man with pepper gas. When confronted by Reinstein on May 5, 1994, about this incident, Herbert claimed that he had sprayed the pepper gas while attempting to ward off an attack by a homeless man threatening him with a knife. Herbert also claimed that the homeless man followed him into the Law School after Herbert had sprayed the pepper gas. Accounts from witnesses and campus police, however, suggested that Herbert was not threatened with a knife nor was he in danger once he entered the Law School.

Prior to the meeting between Reinstein and Herbert, Reinstein had learned of other altercations -- both physical and verbal -- and other activities (such as involvement in the Western Heritage Society, a right-wing student organization that was unpopular among the students and faculty at Temple) with which Herbert was involved. Based on the evidence before him, Reinstein determined that Herbert was a danger to the law school community, suspended Herbert, and referred

Herbert's case to the Law School's disciplinary system. Herbert, however, claimed that Reinstein's reason for the suspension was pretextual and was based upon the fact that Reinstein disagreed with Herbert's political philosophies.

Before the disciplinary committee, Herbert was charged with violating the Law School Code of Student Conduct by engaging in acts of violence and by telling falsehoods to a University administrator. After reviewing the evidence, the committee found Herbert "not guilty" of engaging in acts of violence, but found him "guilty" of telling falsehoods to Dean Reinstein. Thus, on October 17, 1994, the disciplinary committee voted to suspend Herbert from the Law School until January 1997, at which time he would be able to return to the law school on a probationary basis. The committee also imposed a requirement that Herbert undergo 100 hours of psychological therapy and perform 100 hours of community service. The sanction of community service was later repealed during the Law School's internal appeal process.

In an earlier filed action, on September 20, 1994, Herbert filed a *pro se* motion for a TRO and a complaint against Reinstein, the Law School, and Temple, the same defendants named in the instant case. In his complaint, Herbert alleged violations of his due process, freedom of speech, and freedom of association rights under the First and Fourteenth Amendments and § 1983.

The district court denied Herbert's request for a TRO on September 21, 1994, and thereafter conducted a trial in which it entered judgment in favor of Reinstein and Temple on October 21, 1994. Although the district court found, inter alia, that Herbert was afforded all of the process he was due with respect to his initial suspension by Reinstein and by the disciplinary committee, we reversed that ruling on appeal only

with respect to the initial suspension by Reinstein.[1] Accordingly, the case was remanded for the determination of damages, and on remand the district court awarded Herbert one (1) dollar in nominal damages.

On January 21, 1997, Herbert filed the present suit against Reinstein, Temple, the Law School, and several other defendants. In response, on March 7, 1997, several of the defendants filed a motion for sanctions pursuant to Rule 11. Herbert thereafter filed an amended complaint naming only Reinstein, Temple, and the Law School as defendants.

The amended complaint consists of four counts. In Count 1, Herbert alleges that his rights under § 1983 and the Fourteenth Amendment were violated by unlawful proceedings. In Count 2, Herbert alleges that rights under § 1983, the Fourteenth Amendment, and 20 U.S.C. § 1232h were violated by the disciplinary committee's imposition of a condition that Herbert receive psychiatric counseling as a precondition for his returning to the Law School. In Count 3, Herbert alleges that Temple breached its covenant of good faith and fair dealing through its actions. In Count 4, Herbert alleges that his § 1983 and First Amendment rights were infringed upon by a denial of his rights of speech, petition, assembly, and association from 1993 to 1997.

II.

The district court dismissed Counts 1, 2, and 4 of Herbert's amended complaint because they fell outside the

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[1] In an unpublished opinion, we explained that Reinstein should have raised at the initial May 5, 1994, meeting Herbert's prior incidents of aggressive behavior and should have informed Herbert that these incidents influenced Reinstein's decision to suspend Herbert.

applicable statute of limitations period. As none of the parties disputes that the applicable statute of limitations in this case is two (2) years, the statute of limitations issue on this appeal revolves around when Herbert's cause of action accrued.

The district court held that Herbert's cause of action accrued on October 17, 1994, the date that the disciplinary committee announced its proposed punishments. Herbert contends that the proper date that should have been used to calculate when his cause of action accrued is January 18, 1995[2] i.e., the date that the punishments became final. In support of his position, Herbert points to case law holding that statutes of limitations do not run until administrative appeals are exhausted. See, e.g., Jeremy H. by Hunter v. Mount Lebanon Sch., 95 F.3d 272, 280-81 (3d Cir. 1996) (holding that cause of action brought pursuant to the Individuals with Disabilities Education Act ("IDEA") does not accrue until statutory administrative appeals are exhausted).

Temple counters that in § 1983 cases, the cause of action accrues -- and thus the statute of limitations runs -- from the moment when the plaintiff knew or should have known that his or her rights have been violated. As Herbert was aware that he had been suspended on October 17, 1994, Temple submits that such is the date from which the statute of limitations runs in this case. Temple contends that Herbert's "exhaustion of the administrative remedies" argument does not apply to the case at hand because this case does not involve an administrative framework under which a plaintiff must pursue his administrative remedies prior to

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[2] Even though Herbert filed his complaint in the instant action on January 21, 1997, his complaint was timely because January 18, 1997 fell on a Saturday, and January 20, 1997 was Martin Luther King, Jr. Day. See Fed. R. Civ. P. 6(a).

filing an action in court.

We agree. In Chardon v. Fernandez, 454 U.S. 6 (1981), the Supreme Court explained that a cause of action accrues at "the time of the *discriminatory* act, not the point at which the *consequences* of the act become painful." Id. at 8 (emphasis in original). Put another way, it is the "discovery of the original act of discrimination, not future confirmation of the injury or determination that the injury is unlawful, . . . when the statute of limitations begins to run." Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547, 551 (7th Cir. 1996).

Courts consistently have rejected the argument that Herbert advances in this appeal; namely, that pursuit of some internal appeal should toll the statute of limitations. See. e.g., Delaware State College v. Ricks, 449 U.S. 250, 261 (1980) (holding that initiation of grievance procedure did not toll accrual date on claim); Soignier, 92 F.3d at 553 (holding that employee's pursuit of internal grievance procedure does not affect accrual date); Morse v. University of Vermont, 973 F.2d 122 (2d Cir. 1992) ("an internal administrative review of [an] allegedly discriminatory decision has no effect on when the statute of limitations period begins to run").

In addition, the present case does not involve a statutory administrative procedure such as that described in Jeremy H. under the IDEA such that Herbert was obliged to exhaust his administrative remedies prior to filing his claim in court. See Jeremy H., 95 F.3d at 280. Accordingly, we conclude that Herbert's claims arising in Counts 1, 2, and 4 of his amended complaint accrued on October 17, 1994 -- the date the disciplinary committee meted out its sanctions and thus the date that Herbert was aware or should have been aware of his alleged injuries. Thus, the district court properly applied the appropriate limitations period with

respect to Counts 1, 2, and 4.[3]

III.

Count 3 alleges that Temple breached its contract and implied covenants of good faith and fair dealing that arose out of Herbert's matriculation and tuition payments to the Law School. The district court dismissed Count 3 of the amended complaint by holding that it was barred by the doctrine of *res judicata*.[4]

On appeal, Herbert contends that the district court procedurally erred by barring his Count 3 claims under the doctrine of *res judicata*. Herbert argues that *res judicata* cannot be determined solely by the pleadings and thus the preclusive effect of any prior action should not be applied on a Motion to Dismiss made pursuant to Rule 12(b)(6). As the district court relied upon materials outside of the pleadings, Herbert maintains that if the court wanted to rule on the preclusive effect of the prior case, the court should have

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[3] Herbert asserts that his claim in Count 4 is preserved because of Temple's continuous violation from May 1994 until January 1997, during which time Herbert was denied access to campus. We reject this argument. The harm of which Herbert complains is merely the result of the alleged in jury that occurred when Herbert was suspended. Thus, the same accrual date -- October 17, 1994, applies to Count 4.

[4] The district court also held that Count 1 was barred by collateral estoppel and that Count 4 was barred by the doctrine of *res judicata*. Because we have held above that Counts 1 and 4 are barred by the two (2 year statutory bar, we decline to address the preclusive effect that any prior action may have had on those counts.

converted the Motion to Dismiss into a Motion for Summary Judgment, given the parties reasonable opportunity and notice, and given him an opportunity to demonstrate that summary judgment was inappropriate in this case.

We disagree. In Rycoline Products v. C & W Unlimited, 109 F.3d 883 (3d Cir. 1997), we stated that *res judicata* is an affirmative defense that "could be the grounds for a motion to dismiss for failure to state a claim upon which relief can be granted." Id at 886. We noted, however, that if the "'bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal under 12(b)(6). "' Id. (citing Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978)).

Under federal law, *res judicata* requires a defendant to establish that there has been (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action. See Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991). In determining whether two suits are based upon the same cause of action, the court evaluates the "'essential similarity of the underlying events giving rise to the various legal claims."' Id. (quoting Davis v. United States Steel Supply, 688 F.2d 166, 171 (3d Cir. 1982) (en bane). The promotes the policy of judicial economy which requires that a plaintiff "'present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence."' Lubrizol, 929 F.2d at 963 (quoting United States v. Athlone Indus., Inc., 746 F.2d 977, 984 (3d Cir. 1984)).

In the instant case, the face of the amended complaint indicates that the breach of contract claims raised by Herbert in Count 3 could have been brought in his earlier action before the district court. Indeed, the breach of contract claim arises out of his initial suspension by Reinstein, Reinstein's

alleged pretextual reason for suspending him, and the subsequent disciplinary hearings and punishments that developed thereafter. Thus, on its face, this breach of contract claim from the present action and the due process and freedom of speech and association claims from the initial complaint arose out of the same transaction or occurrence with Reinstein and Herbert's ensuing suspension. Accordingly, we conclude that the district court did not err in invoking the *res judicata* bar to Count 3 of Herbert's amended complaint on a Motion to Dismiss.

IV.

In sum, we will affirm the district court's order dated August 22, 1997, dismissing Herbert's amended complaint.

TO THE CLERK:

Please file the foregoing memorandum opinion.

/s/Garth
Circuit Judge

DATED: June 5, 1998

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINCOLN J. HERBERT	:	CIVIL ACTION
	:	
v.	:	
	:	
ROBERT J. REINSTEIN, et. al.	:	NO. 97-0457

Newcomer, J. August 22, 1997

M E M O R A N D U M

Presently before this Court are defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 11, and in the Alternative, for Dismissal Under Federal Rule of Civil Procedure 12(b)(6), and plaintiff's response thereto, and defendants' reply thereto, and plaintiff's rebuttal to defendants' reply. For the reasons that follow, this Court grants in part and denies in part defendants' Motion.

I. Facts and Procedural History

This action grows out of an ongoing and contentious dispute between the plaintiff Lincoln Herbert and the defendants Temple University School of Law ("Law School"), Temple University ("Temple") and Robert J. Reinstein, Dean of the Law School. Prior to this instant action, Mr. Herbert sued the same defendants from this action in this Court. In this earlier action, this Court made extensive findings of fact and conclusions of law. Herbert v. Reinstein, No. CIV.A.94-5765, 1994 WL 587095 (E.D. Pa. Oct. 21, 1994). In order to put the instant action into its proper context, the Court will

set forth the relevant factual and procedural background from Mr. Herbert's first action.

On May 3, 1994, Mr. Herbert, a student at the Law School, was involved in an altercation with a homeless person, whom Mr. Herbert sprayed with "pepper gas." An asthmatic Law School employee was exposed to some of the pepper gas left in the wake of the incident and was hospitalized with injuries caused by the gas. Dean Reinstein, having solicited accounts of the events of May 3, 1994, from various witnesses and Temple campus police, called Mr. Herbert into his office on May 5, 1994. Mr. Herbert claimed that he had inadvertently sprayed the employee while attempting to ward off an attack by a homeless person brandishing a knife. Reports by the police and witnesses contradicted Mr. Herbert's account of the incident. These reports indicated that the homeless person did not have a knife and that Mr. Herbert was not in any danger inside the law school. Dean Reinstein decided that Mr. Herbert represented a "clear and present danger" to the law school community, whereupon Dean Reinstein suspended Mr. Herbert and referred the case to the Law School's disciplinary system. Prior to Mr. Herbert's suspension on May 5, 1994, other activities of Mr. Herbert at the law school had come to the attention of Dean Reinstein. While a student at the Law School. Mr. Herbert founded and acted as president of the Western Heritage Society (WHS), a "right-wing" student organization. The opinions of Mr. Herbert and the WHS were unpopular among many students, faculty and administrators at Temple and the Law School. Dean Reinstein was aware of various other incidents in which Mr. Herbert had been involved in physical and verbal altercations. Mr. Herbert alleged that Dean Reinstein's stated reason for the suspension was a pretext and that Dean Reinstein actually suspended Mr. Herbert because he disagreed with Mr. Herbert's political philosophy.

At the proceedings before the disciplinary committee, Mr. Herbert was charged with violating the Law School Code of Student Conduct by engaging in acts of violence and by telling falsehoods to a University administrator. After reviewing all the evidence, the panel found Mr. Herbert not guilty of engaging in acts of violence and guilty of telling falsehoods to Dean Reinstein. On October 17, 1994, the disciplinary committee voted to suspend Mr. Herbert from the law school until January 1997, at which time he could return as a student on a probationary basis.

The committee also voted to require that Mr. Herbert undergo 100 hours of psychological therapy and perform 100 hours of community service. The sanction requiring community service was removed through the Law School's internal appeals process. On September 20, 1994, Mr. Herbert, proceeding pro se, filed a motion for a temporary restraining order (TRO), a memorandum of law in support of his request for a TRO and a complaint (Original Complaint) with this Court. The defendants named in that suit were the same defendants as those named in the instant lawsuit. In the Original Complaint, Mr. Herbert alleged violations of his due process, free speech and free association rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983.

This Court denied Mr. Herbert's motion for a TRO on September 21, 1994, and ordered consolidation of plaintiff's request for a preliminary injunction with a trial on the merits under Federal Rule of Civil Procedure 65(a)(2). Plaintiff's case was tried before this Court, which entered judgment in favor of defendants and rendered findings of fact and conclusions of law in a Memorandum Opinion dated October 21, 1994. The Court found, inter alia, that Mr. Herbert was afforded all the process he was due in his initial suspension from the Law School on May 5, 1994 and at the subsequent internal Law School disciplinary hearing held on October 3

and 10, 1994. Plaintiff appealed this Court's Order, dated October 1, 1994, to the United States Court of Appeals for the Third Circuit on November 18, 1994. On October 6, 1995, a three-judge panel of the Third Circuit affirmed this Court's denial of injunctive relief in an unpublished opinion. Herbert v. Reinstein, No. 94-2138, slip op. at 18 (3d Cir. Oct. 6, 1995). However, the majority reversed in part, finding that while the internal disciplinary process eventually afforded Mr. Herbert sufficient due process, he had not been provided all the process he was due at his initial May 5, 1994 meeting with Dean Reinstein. Id at 13. Specifically, the majority found that Dean Reinstein should have raised again with Mr. Herbert his prior incidents of aggressive behavior and should have informed Mr. Herbert that these prior incidents influenced his decision to temporarily suspend Mr. Herbert. Id. The Third Circuit remanded the case to this Court for determination of any damages. This Court held a damages hearing on February 20, 1996. On February 23, 1996, this Court entered findings of fact and conclusions of law, awarding Mr. Herbert one dollar in nominal damages. Herbert v. Temple University School of Law, No. CIV.A.94-5765, 1996 WL 84849, at *4 (E.D. Pa. Feb. 23, 1996). Subsequently, Temple sent Mr. Herbert a check for the award, which he rejected. Mr. Herbert appealed pro se this Court's February 23, 1996 Order. His appeal was recently dismissed by the Third Circuit on procedural grounds.

On January 21, 1997, Mr. Herbert filed the instant action against numerous defendants, including the defendants who were named in his first suit. On March 7, 1997, certain of the defendants served plaintiff's counsel with a motion for sanctions against plaintiff and plaintiff's counsel pursuant to Federal Rule of Civil Procedure 11. In the face of this motion for sanctions, plaintiff, represented by new lead counsel, filed an Amended Complaint on March 28, 1997. Mr. Herbert's Amended Complaint dropped many of the claims and defendants named in the first complaint. The

Amended Complaint names as defendants Temple, the Law School and Dean Reinstein. The Amended Complaint consists of four counts. In Count 1, Mr. Herbert alleges that his rights under 42 U.S.C. § 1983 and the Fourteenth Amendment were violated by unlawful proceedings. In Count 2, Mr. Herbert alleges that his rights under § 1983, the Fourteenth Amendment, and 20 U.S.C. § 1232h were violated by the imposition of a sanction requiring psychiatric counseling. In Count 3, Mr. Herbert alleges that Temple breached a covenant of good faith and fair dealing through its actions. In Count 4, Mr. Herbert alleges that his Section 1983 and First Amendment rights were violated by a denial of rights of speech, petition, assembly, and association from 1993 to 1997. Presently before this Court is defendants' motion for Rule 11 sanctions, and in the alternative, for dismissal under Federal Rule of Civil Procedure 12(b)(6).[1] The defendants argue (1) that Counts 1, 2, and 4 of the Amended Complaint are time-barred under the applicable two-year statute of limitations; (2) that Counts 1, 3, and 4 are barred by the doctrines of res judicata or collateral estoppel; and (3) that Count 2, in addition to being time-barred, is without merit as a matter of law. In the motion for sanctions, defendants move in the alternative for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).

Mr. Herbert rejoins that Counts 1, 2, and 4 are not time-barred for two reasons. First, Mr. Herbert asserts that his cause of action did not accrue until January 18, 1995, the date on which the plenary faculty affirmed in part the sanctions handed down by the disciplinary committee. Second, Mr. Herbert argues that since January 18, 19, and 20,

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[1] Defendants Temple and the Law School originally filed this motion on April 23, 1997, and Dean Reinstein, who at the time of the filing of the motion had not bee properly served with Plaintiff's complaint, joined in this motion on June 5, 1997.

1997, fell on Saturday, Sunday, and Martin Luther King, Jr. Day, Federal Rule of Civil Procedure 6(a) allowed him to file on the January 21, 1997. Mr. Herbert argues that Counts 1, 3, and 4 should not be barred by res judicata or collateral estoppel because in his Complaint, dated September 15, 1994, he only raised the issue of his initial suspension by Dean Reinstein, and not the suspension and sanctions determined by the disciplinary committee. Mr. Herbert argues that Count 2, alleging violations of Section 1232h, is not lacking in merit, and therefore not sanctionable. Mr. Herbert's counsel also argues that their investigation, including a polygraph examination, was sufficient to determine that their client was telling the truth."

II. Standards

A. Rule 11 Standard

Courts are to give the Federal Rules of Civil Procedure their plain meaning. Business Guides, Inc. v. Chromatic Comm. Enter., Inc., 498 U.S. 533, 540, 111 S.Ct. 922, 927, 112 L.Ed.2d 1140 (1991) (citing Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123, 110 S.Ct. 456, 458, 107 L.Ed.2d 438 (1989)). Under Rule 11, "[a] signature certifies to the court that the signer has read the document, has conducted a reasonable inquiry into the facts and the law and is satisfied that the document is well grounded in both, and is acting without any improper motive." Business, 498 U.S. at 540, 111 S.Ct. at 927 (citing 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1335 (2d ed. 1990)). "'The certification requirement now mandates that all signers consider their behavior in terms of the duty they owe to the court system to conserve its resources and avoid unnecessary proceedings.'" Business, 498 U.S. at 542, 111 S.Ct. at 128 (quoting Wright & Miller, § 1331) (emphasis added by Supreme Court). To comply with these requirements, counsel must conduct a reasonable investigation of the facts and a normally competent

level of legal research to support the presentation. Mary Ann Pensierio, Inc. v. Lingle, 847 F.2d 90, 94 (3d Cir. 1988); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (ad Cir. 1986). Rule 11 is aimed at curbing thee abuses of the judicial system. Business, 498 U.S. at 540, 11i S. Ct. at 927; Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 385, 107 S. Ct. 2447, 2450, 110 L. Ed.2d 359 (1990). The main purpose of the rule is not to award parties who have been victimized by vexatious litigation but rather to deter baseless filings and curb abuses. Business, 498 U.S. at 533, 111 S.Ct. at 929.

Rule 11 is governed by the objective reasonableness under the circumstances standard. Business, 498 U.S. at 532, 111 S.Ct. at 927; Pensierio, 847 F.2d at 94. The Third Circuit has explained that courts should "avoid using the wisdom of hindsight and should test the signer's conduct by inquiring into what was reasonable to believe at the time the pleading, motion or other paper was submitted." Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (ad Cir. 1987) (citations and internal quotations omitted).

Determining whether an attorney has violated Rule 11 involves a consideration of three types of issues. First, the court must consider factual questions regarding the nature of the attorney's pre-filing inquiry and factual basis of the pleading or other paper. Second, legal issues are raised in considering whether a pleading is Warranted by existing law or a good faith argument" for changing the law and whether the attorney's conduct violated Rule 11. Third, the district court must exercise discretion to tailor an "appropriate sanction. "Cooter, 496 U.S. 394, 398, 110 S. Ct. at 2450.

The Third Circuit has identified five factors which should be considered in determining the reasonableness of an attorney's pre-filing inquiry: (1) the amount of time available to the signer for conducting the factual and legal

investigation; (2) the necessity for reliance on a client for underlying factual information; (3) the plausibility of the legal position advocated; (4) whether the case was referred to the signer by another member of the Bar; and (5) the complexity of the legal and factual issues implicated. Pensierio, 847 F.2d at 95. Standards for 12(b)(6) Pursuant to Fed. R. Civ. P. 12(b)(6), a court should dismiss a claim for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Because granting such a motion results in a determination on the merits at such an early stage of a plaintiff's case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 828 F.2d 663, 664-65 (3d Cir. 1988) (quoting Estate of Bailey v. County of York, 768 F.2d 503, 506 (3d Cir. 1985)).

III. Discussion

A. Counts 1, 2, and 4 are Time-Barred

In § 1983 actions, the applicable period of limitations is borrowed from the statute of limitations on personal injury actions of the state in which the alleged violations occurred. Wilson v. Garcia, 471 U.S. 261, 275, 105 S. Ct. 1938, 1946, 85 L.Ed. 2d 254, 266 (1985). The statute of limitations for a § 1983 claim arising in Pennsylvania is two years. Osei-Afriyie v. Medical College of Pennsylvania, 937 F.2d 876, 885 (3d Cir. 1991). A § 1983 cause of action accrues on the date when a plaintiff knew or should have known his or her rights had been violated. Genty v. Resolution Trust Corp., 937 F.2d 899 (3d Cir. 1991). In Chardon v. Fernandez, a case involving an alleged politically-motivated dismissal of a nontenured administrator, the Supreme Court took pains to explain the

precise moment at which a § 1983 cause of action accrues: "[T]he proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful. The fact of termination is not itself an illegal act." Chardon v. Fernandez, 454 U.S. 6, 8, 102 S.Ct. 28, 29, 70 L.Ed. 2d 6 (1981) (citations omitted) (citing Delaware State College v. Ricks, 449 U.S. 250, 258, 259, 101 S.Ct. 498, 504, 66 L.Ed.2d 431, 441 (1980)).

In a case factually similar to the one at bar, Siblerud v. Colorado State Board of Agriculture, 896 F.Supp. 1506 (D. Colo. 1995), the court held that the injury allegedly suffered by plaintiff, a graduate student dismissed from Colorado State University for academic violations, accrued on the date on which the plaintiff had first received a letter notifying him of his dismissal. The court cited Ricks for the proposition that "[t]he grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made.' Id. at 1511 (quoting Ricks, 449 U.S. at 261, 101 S.Ct. at 506).

Here, the allegedly illegal act charged in Counts 1 and 2 was the denial of due process in the Law School's disciplinary proceedings and the sanctions issued at those proceedings. The alleged deprivation of due process and violations of Section 1232h occurred when Mr. Herbert first knew or should have known that he was deprived of his rights. Mr. Herbert knew that he was facing these sanctions when they were handed down by the Disciplinary Committee on October 17, 1994; Mr. Herbert's alleged injury thus occurred on October 17, 1994. The statute of limitations on Mr. Herbert's cause of action began to run on October 17, 1994; Mr. Herbert did not file his action until approximately two years and three months from the date his cause of action accrued. Therefore, Counts 1 and 2 are time-barred.

The portions of Count 4, which allege deprivations of

Mr. Herbert's First Amendment rights that occurred before January 18, 1995, are also time-barred. In Count 4, Mr. Herbert claims that his First Amendment rights were violated from September 1993 to January 1997. Clearly, any portion of Count 4 which is based on events that occurred before January 18, 1995 would be time-barred by the two-year statute of limitations for § 1983 claims. Plaintiff himself admits that his cause of action could not have accrued any later than January 18, 1995.

In an apparent attempt to save any claim that he may have had before January 18, 1995, plaintiff alleges that defendants committed continuing civil rights violations within the two-year period prior to his filing of this instant action, which purportedly works to reach back and bring the older time- barred claims within the statute of limitations. In his complaint, Mr. Herbert alleges that the defendants' actions constituted a "continuing course of conduct which violated [his] First Amendment Rights from September 1993 to January 1997." Presumably paragraphs 51-53 of Mr. Herbert's Amended Complaint are meant to establish that the statute of limitations on his claims from before January 18, 1995 is tolled by the doctrine of continuing violations."

This claim of continuing violations fails for two reasons. First, courts are generally wary of extending the doctrine to save claims arising outside of the employment discrimination area. LRL Properties v. Portage Metro Hous. Ruth., 55 F.3d 1097, 1106 n.3 (6th Cir. 1995) (quoting McGregor v. Louisiana State Univ. Bd. Of Supervisors, 3 F.3d 850, 866 (5th Cir. 1993)). Second, the events alleged in paragraphs 51-53 of Mr. Herbert's Amended Complaint are merely the continuing effects of his suspension handed down by the disciplinary panel. Since both this Court and the Third Circuit found those proceedings to be constitutional, Mr. Herbert cannot claim that the sanctions imposed by the panel on October 18, 1994 were unconstitutional. The only alleged

deprivation of First Amendment rights which occurred after January 18, 1995, was the exclusion of Mr. Herbert from Temple's campus. Since this was merely the ongoing effect of his constitutionally valid suspension from the Law School, it is insufficient to sustain Count 4. This finding would be true even if his initial suspension had been found constitutionally infirm. See Muniz-Cabrero v. Ruiz, 23 F.3d 607, 610 (1st Cir. 1994) ("A continuing violation is not stated if all that appears from the complaint is that the plaintiff continues to suffer from the ongoing effects of some past act of discrimination.").[2]

B. Counts 1, 3, and 4 Barred by Res Judicata and Collateral Estoppel

Count 1 is also barred by collateral estoppel, as it was actually litigated and was necessary to the determination of the first lawsuit. The fact that there was due process at the Law School's internal disciplinary proceedings was an important factor in determining damages in plaintiffs' first action against these same defendants.

Collateral estoppel requires that "a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

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[2] The parties' disagreement about whether Rule 6(a) expands the statute of limitations is irrelevant. Since Mr. Herbert's complaint is based on events occurring before January 18, 1995, there is no need to address this issue.

In Burlington Northern R.R. Co. v. Hyundai Merchant Marine Co., 63 F.3d 1227, 1232 n.3 (3d Cir. 1995) (quoting Southern Pacific R.R. v. United States, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897)).

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether of the same or a different claim. 18 Moore's Federal Practice Digest § 132.01[2] (1997). A party cannot avoid issue preclusion simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first. Rather, the party bears the consequences of inadequate litigation by waiving the right to do so in a subsequent case. Id. at § 132.02[2][d]. "If the court in the former action assumed to adjudicate an issue or question not submitted by the parties in their pleadings nor drawn into controversy by them in the course of evidence, and bases its judgment on that adjudication, the judgment is not conclusive in a subsequent proceeding under the doctrine of collateral estoppel." Id. at § 132.03[2][c] (footnote omitted).

This Court specifically found that Mr. Herbert had received all process which he was due during the Law School's internal disciplinary proceedings. Mr. Herbert placed this matter into issue through his own introduction of evidence and testimony in at issue. Although the Third Circuit reversed this Court's Oct. 21, 1994 Order insofar as it found that Mr. Herbert was denied due process at the time of his initial suspension, the Third Circuit specifically instructed that:

> [T]he district court, even if it determines that the initial suspension was justified, should take into account that the denial of procedural due process should be

> actionable for nominal damages without proof of actual injury. However, we conclude that the proceedings before the Disciplinary Committee were constitutionally adequate and thus, as Herbert was suspended by the Committee, he is not entitled to injunctive relief. Furthermore, the court should, in considering damages, take into account that Herbert ultimately was suspended in procedurally proper hearings.
>
> Herbert v. Reinstein, No. 94-2138, slip. op. at 17-18 (3d. Cir. Oct. 6, 1995) (citation omitted).

This Court followed the Third Circuit's instructions by making the following finding of law:

> Herbert did not offer sufficient evidence demonstrating that any distress that he suffered was caused by the May 5, 1994, due process deprivation. Rather, the distress he described resulted from his ultimate suspension in October, 1994. Where a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure. Here, Herbert's claim for damages fails because Herbert did not set forth any injury stemming from procedural due process violation itself.
>
> Herbert v. Reinstein, No. CIV.A.94-5765, 1996 WL 84849, at *3 (E.D. Pa. Feb. 23, 1996) (citations omitted).

Thus, both this Court and the Third Circuit found that Mr. Herbert's suspension by the disciplinary committee was constitutional. This determination was integral to this Court's decision to only award Mr. Herbert one dollar in nominal damages. Therefore, this Court's decision in Mr. Herbert's earlier suit is preclusive of Count 1 of his Amended Complaint.

Res judicata is a broader doctrine than collateral estoppel. The Supreme Court in Cromwell v. County of Sac., defined res judicata this way:

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.
>
> 94 U.S. 351, 352, 24 L.Ed. 195, 197-98 (1876).

Certainly, Mr. Herbert cannot claim that he would have been unable to allege the facts regarding First Amendment violations occurring from September 1993 to September 20, 1994, the date he filed his first suit. Mr. Herbert made similar pleadings, albeit insufficiently, in his first suit. Mr. Herbert explicitly chose not to appeal this finding to the Third Circuit and is now barred from

reasserting it in a second lawsuit.[3] His allegations of violations of his earlier lawsuit, and cannot now claim that the question of whether he received due process during the disciplinary proceedings was not First Amendment rights occurring subsequent to the filing of his first complaint are merely the results of the suspension which this Court and the Third Circuit both found to be constitutional. Thus, Count 4 is barred by the doctrine of res judicata.

In Count 3, Mr. Herbert alleges no facts regarding

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[3] Indeed, the Third Circuit held:

> [Plaintiff] explicitly has chosen not to appeal certain issues, relying on this court to require another trial on the merits. In particular, the District Court dismissed Herbert's allegations of First Amendment violations, concluding that although Herbert made such allegations at trial, "he failed to sufficiently plead these claims in his Complaint." Findings of Fact and Conclusions of Law at 6 n.1. But Herbert chose explicitly not to appeal this issue. Br. At 3; Reply Br. At iv. Herbert's reliance on obtaining another trial is misplaced. Even if we were to require another trial on the merits, the District Court still would be faced with what it believed to be a complaint that inadequately pled First Amendment violations. Since Herbert waived explicitly this issue on appeal and neither party has briefed this issue, however, we decline to review it.

Plaintiff cannot now do what the Third Circuit has already held that he cannot do, that is, resurrect his First Amendment claim to try to obtain a new trial.

what constitutes the alleged breach of a covenant of good faith and fair dealing. Instead, he merely incorporates the allegations listed earlier in his Amended Complaint, in Counts 1 and 2. Since there was extensive testimony at his first trial and explicit findings of fact regarding alleged violations of his rights under the Fourteenth Amendment in this Court's Order, dated October 21, 1994, this claim is also barred, as Mr. Herbert could have brought it at his first trial.

C. Section 1232h Violation

Mr. Herbert's claim that the psychiatric sanctions imposed by the Law School violate 20 U.S.C. § 1232h is a question of prima impressionist To the Court's best knowledge, there have been no cases brought under 1232h, either alone or in conjunction with § 1983.

In Count 2, plaintiff claims that the imposition of a sanction by the Law School disciplinary panel requiring him to submit to a psychiatric evaluation and treatment, if treatment was recommended after the evaluation, violated 20 U.S.C. 1232h and 42 U.S.C. § 1983. Defendants claim that Mr. Herbert has no claim under § 1232h. Although defendants' argument is not entirely clear, it appears that defendants argue that plaintiff may not maintain an action under § 1983 and § 1232h because (1) § 232h does not provide a private right of action and (2) § 1983 does not provide a remedy for a violation of § 1232h.

To begin, this Court finds that it is irrelevant that § 1232h does not provide a private right of action because a right of private action may exist under § 1983 for the deprivation of a right even where there is no private right of action provided for within a statute. The Supreme Court has noted:

> [Whether a plaintiff may sue under § 1983 for the violation of a federal statute] is a different

> inquiry than that involved in determining whether a private right of action can be implied from a particular statute. In implied right of action cases, we employ the four-factor test to determine "whether Congress intended to create the private remedy asserted" for the violation of rights. The test reflects a concern grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because 1983 provides "an alternative source of express congressional authorization of private suits," these separation of powers concerns are not present in a § 1983 case. Consistent with this view, we recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy.
>
> Wilder v. Virginia Hospital Association, 496 U.S. 498, 508 n.9, 110 S.Ct. 2510, 2516 n.9, 110 L.Ed.2d 455 (1990) (citations omitted).

Thus, the question before this Court is whether § 1983 provides a remedy to plaintiff for a violation of § 1232h.

Section 1983 provides a remedial device to enforce rights under the United States Constitution and federal law. U.S.C. § 1983. The only exceptions to this rule are (1) where the statute does not create an enforceable right within the meaning of § 1983 and (2) where Congress manifested in the statute itself an intent to foreclose its private enforcement.

such as when there is a statutorily created comprehensive remedial system that provided for private action and left no room for additional private remedies under § 1983. Farley v. Philadelphia Hous. Auth., 102 F.3d 697 (ad Cir. 1996). A court must analyze the relevant statutory provisions "in the light of the entire legislative enactment." Suter v. Artist M., 503 U.S. 347, 357, 112 S.Ct. 1360, 1366, 118 L.Ed.2d 1 (1992). The court must determine whether Congress intended the statutory provision to benefit the putative plaintiff. Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106, 110 S. Ct. 444, 448, 107 L.Ed.2d 420 (1989). The language of the statute must be mandatory, not merely precatory. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 18, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981). Finally, the right may not be too vague and amorphous to be beyond the competence of the judiciary to enforce. Golden State, 493 U.S. at 106, 110 S.Ct. at 448.

After reviewing § 1232h, other related statutes and regulations, and the applicable case law, the Court finds that §1983 does not provide a right of action for Mr. Herbert because § 1232h was not intended to benefit Mr. Herbert, and thus it does create an enforceable right. See Golden State, 493 U.S. at 106, 110 S.Ct. at 448 (holding that § 1983 does not provide a cause of action for a putative plaintiff where the federal statute, which plaintiff claims was violated, was not intended to benefit plaintiff).

Section 1232h provides, in relevant part, that "[n]o student shall be required, as part of any applicable program, to submit to survey, analysis, or evaluation that reveals information concerning," inter alia, "mental or psychological problems embarrassing to the student or his family. . . without the prior consent of the student." 20 U.S.C. § 1232h (emphasis added). Mr. Herbert would appear to have a cause of action under Section 1232h if (1) the evaluation and examinations were "part of an applicable program" and (2)

the sanction requiring psychiatric exam and possible psychiatric counseling before returning to the Law School were the sort of examination or psychiatric treatment covered by the statute. Thus, as an initial matter, this Court must determine whether the phrase "as part of any applicable program" expresses a contemplation on Congress's part of a situation like Mr. Herbert's.

Section 1221 of the General Education's Provisions Act provides that an "applicable program" is "any program for which the Secretary or the Department [of Education] has administrative responsibility as provided by law or by delegation of authority pursuant to laws and "includes each program for which the Secretary or Department has administrative responsibility under the Department of Education Organization Act or under Federal law effective after May 4, 1980." 20 U.S.C. § 1221(c)(1); 34 C.F.R. § 98.4(c)(1). The text of this statute and the regulations implementing it indicate that Section 1232h was meant to apply, only to programs administered by the Secretary of Education.

Under the facts of this case, it is clear that Section 1232h was not intended to benefit Mr. Herbert because Mr. Herbert was not required to submit to a psychiatric evaluation and/or examination as part of any "applicable program." Indeed, defendant Temple states that it does not require any of its students, as part of any program, to submit to any type of psychological evaluation. Plaintiff simply fails to set forth any facts that would indicate he was required to submit to a psychological evaluation as part of his law school program. Instead, the facts in the Amended Complaint indicate that Mr. Herbert was required to submit to psychiatric evaluation and treatment as part of a disciplinary sanction, not as part of any "applicable program" within the meaning of §§ 1232h and 1221. Because Mr. Herbert was not required by Temple to submit to any psychological examination as part of any

"applicable program," plaintiff cannot claim an enforceable right under Section 1232h. As such, the Court finds that Mr. Herbert cannot establish a §1983 claim based on a violation of § 1232h.

D. Rule 11 Sanctions and/or 12(b)(6) Dismissal

In the first instance, defendants have moved for Rule 11 sanctions against plaintiff and plaintiff's counsel based on their bad faith conduct in litigating this action. After giving this issue considerable thought, the Court concludes that it would be inappropriate to impose Rule 11 sanctions in this case. While Mr. Herbert and his counsel may have been mistaken in arguing that each of his claims were not time-barred or barred by the doctrines of collateral estoppel or res judicata, the questions were sufficiently fine that they do not merit Rule 11 Sanctions. Further, given the dearth of authority interpreting § 1232h, and the lack of authority specifically precluding Mr. Herbert's interpretation, the Court cannot use its finding that § 1232h does not provide Mr. Herbert with a cause of action under § 1983 as grounds for imposing sanctions. Therefore, the Court denies defendants' motion for sanctions.

However, for the purposes of Rule 12(b)(6), it appears to a certainty that the statute of limitations, the doctrines of res judicata and collateral estoppel, and the inapplicability of § 1232h to the facts of this case do not permit Mr. Herbert to recover on any of claims in his Amended Complaint. Therefore, the Court grants defendants' motion in the alternative for dismissal pursuant to Rule 12(b)(6). Plaintiff's Amended Complaint and action is dismissed with prejudice as against all defendants.

An appropriate Order follows.

/s/ Newcomer
Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINCOLN J. HERBERT	:	CIVIL ACTION
	:	
v.	:	
	:	
ROBERT J. REINSTEIN,	:	
et. al.	:	NO. 97-0457

O R D E R

AND NOW, this 22ND day of August, 1997, upon consideration of the following Motions, and any responses thereto, it is hereby ORDERED as follows:

1. The Motion of Defendants for Sanctions Pursuant to Federal Rule of Civil Procedure 11 is DENIED;

2. The Motion in the Alternative for Dismissal Pursuant to Federal Rule of Civil Procedure 12(b)(6) is GRANTED;

3. Plaintiff's Amended Complaint and action is hereby DISMISSED with prejudice as against all defendants; and

4. The Clerk of the Court shall CLOSE this case for statistical purposes.

AND IT IS SO ORDERED.

/s/ Newcomer
Clarence C. Newcomer, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1795

LINCOLN HERBERT,

Appellant

v.

ROBERT J. REINSTEIN, DEAN OF TEMPLE UNIVERSITY SCHOOL OF LAW AND VICE-PRESIDENT OF TEMPLE UNIVERSITY; TEMPLE UNIVERSITY SCHOOL OF LAW; TEMPLE UNIVERSITY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 97-cv-00457)

Submitted on May 22, 1998

Before BECKER, Chief Judge, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE and RENDELL, Circuit Judges

O R D E R

The petition for rehearing in banc filed by appellant, Lincoln Herbert, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/ Jane R. Roth
Circuit Judge

Dated: Sep. 17, 1998

DR/CC: RPM
CWH

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1795

LINCOLN HERBERT,

Appellant

v.

ROBERT J. REINSTEIN, DEAN OF TEMPLE UNIVERSITY SCHOOL OF LAW AND VICE-PRESIDENT OF TEMPLE UNIVERSITY; TEMPLE UNIVERSITY SCHOOL OF LAW; TEMPLE UNIVERSITY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-00457)
District Judge: Honorable Clarence C. Newcomer

Submitted under Third Circuit LAR 34.1(a)
Thursday, May 21, 1998

BEFORE: ROTH, McKEE and GARTH, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on Thursday, May 21, 1998.

On consideration whereof, it is now here ADJUDGED and ORDERED by this court that the order of the district court dated August 22, 1997 be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

/s/ Bradford A. Baldus
Chief Deputy Clerk

DATED: June 5, 1998

Certified as a true copy and issued in lieu
of a formal mandate on September 25, 1998.

Teste: /s/ P. Douglas Sisk
Clerk, U.S. Court of Appeals
For the Third Circuit.

APPENDIX E

CODE OF STUDENT CONDUCT

TEMPLE UNIVERSITY SCHOOL OF LAW
CODE OF STUDENT CONDUCT AND
DISCIPLINARY PROCEDURES
AS ADOPTED 5/20/86
WITH AMENDMENTS THROUGH 8/31/90

I. GENERAL PROVISIONS

A. Jurisdictional Statement. This Temple University School of Law Code of Student Conduct and Disciplinary Procedures ("Code") governs law student conduct and proceedings regarding violations of this Code. This Code is intended to modify the general University Student Rights, Code of Conduct and Disciplinary Procedures and to supersede the general University Code and Procedures for TLS students.

. . .

II. STUDENT CONDUCT

It shall be a violation of this Code for a TLS student knowingly to do or to attempt to do or assist in any of the following:

A. give or secure information about an examination, except as authorized by the examining professor;

B. consult or copy from books, papers, or notes of any kind during an examination, except as authorized by the examining professor;

C. continue to write an examination when the

proctor has announced that the time allotted has elapsed;

D. plagiarize or use unauthorized materials in work submitted in any academic pursuit or Law School competition, including but not limited to, guided research or seminar papers, examinations, Law Quarterly, and Moot Court;

E. for a student taking a make-up exam, discussing the examination with a student who took the examination at any earlier time, and for a student who took an examination at the regularly scheduled time, discussing the examination with a student taking a make-up;

F. fail to report any violation of this Code about which the student has personal knowledge;

G. refuse otherwise to cooperate in any proceedings under the Code, including but not limited to failing to provide or providing false information, testimony, or other evidence during an investigation or hearing;

H. interfere or attempt to interfere with the appearance or testimony of any person before the Law School Discipline Committee;

I. misrepresent the student's academic achievement, record, or other activities in connection with seeking employment, financial aid, scholarly awards, acceptance into any program at an educational institution, or any other thing of value;

J. communicate to a member of the Faculty or Administration serious falsehoods concerning official business of the Law School, including the application process to obtain admission to the Law School;

K. ask for or receive any fee, compensation, or

other thing of value as remuneration from any client for whom the student rendered services as would be rendered by an attorney to a client, in connection with a Law School related activity;

L. carry on any activity on Law School property for personal profit, without the express written consent of the Dean of Students;

M. violate any Law School rule, regulation, or order duly promulgated by the Faculty or Dean and prominently posted, except when procedures and sanctions are already provided elsewhere with regard to the rule, regulation, or order.

N. violate any duly promulgated and prominently posted rule, regulation, or order of the University, applicable to the School of Law;

O. disclose his or her examination number to a Faculty member in violation of the anonymous grading system;

P. misappropriate or fail to account for any funds advanced to the student by the Law School;

Q. seriously and unreasonably disrupt, interfere with, or attempt to disrupt or interfere with the conduct of classes or any other normal or regular activities of the Law School;

R. commit any theft or robbery on Law School property; make any seriously intended threat of bodily harm or commit any act of physical violence or intimidation toward a member of the Law School community; or hide, destroy, or deface any Law School property, including Law Library materials;

S. be convicted of a crime that reflects adversely on the Student's trustworthiness, honesty, or fitness to be a lawyer in any other respects; and

T. engage in conduct, not otherwise covered by any other provision of the Code, involving dishonesty, fraud, deceit or misrepresentation with regard to activities or programs related to the Law School, which adversely reflect upon his or her fitness to remain a student at the Law School.

III. SANCTIONS

A. Upon determining that a student has violated the Code, the Law School Discipline Committee may impose as a sanction any regulation of the Student's connection with the University or Law School, including warning, reprimand, probation, exclusion from one or more Law School or University activities, suspension or permanent expulsion.

B. In addition, and irrespective of any other sanction, the Committee may notify the Registrar to enter a grade of "F" in any course involved in the violation, except that where the Committee determines that the Student gained an unfair advantage by continuing to write an examination after a proctor had announced that the time allotted had elapsed. The Committee may notify the Registrar to reduce by one (1) grade the grade assigned for the course involved or to enter administrative credit for the course involved.

C. Whatever sanction is imposed shall bear a reasonable relationship to the severity of the violation that the Committee has determined occurred, except that the Committee may also consider with regard to sanction the Student's background, including the Student's record of

prior violations or lack of violations.

IV. DISCIPLINARY PROCEDURES

D. Hearing Procedures.

. . .

(10) (a) At the conclusion of the hearing the Committee shall decide whether a violation has occurred. Except for a charge of violation of Section II.T., the Committee shall decide that a violation has occurred only if five (5) of the members, including any alternates who participated in the hearing, determine that a violation was proven by clear and convincing evidence. With regard to a charge of violation of Section II.T., the Committee shall decide that a violation has occurred only if the Committee members, including any alternates who participated in the hearing, unanimously determine that a violation was proven by clear and convincing evidence.

(b) If the Committee does not decide that a violation has occurred, the charge shall be dismissed with prejudice and no record of the charge or the proceeding shall be made or kept in the Student's file or transcript. The Committee Chairperson shall immediately notify the Student in writing of the dismissal.

(c) If the Committee decides that a violation has occurred, it shall support that decision by preparing in writing brief findings of fact and the application of the provisions of the TLS Code to these factual findings.

(11) (a) If the Committee decides that a violation has occurred, a second hearing shall be held before the same members and alternates on the issue of

sanction. This sanction hearing shall be held as soon as practicable after the determination of violation. Additional evidence and testimony regarding the occurrence of the violation shall not be presented at the sanction hearing, but either party may present evidence and testimony regarding the Student's background and character. Law School Counsel and the Student (or the Student's counsel or advisor) may also make brief argument on sanction.

(b) The Committee shall determine the sanction to be imposed by majority vote of the members and alternates participating in the hearing. The Committee shall promptly notify the Student and Law School Counsel of the sanction to be imposed.

(c) The Committee shall prepare a brief written report of its reasons for selecting the sanction to be imposed.

(12) Within seven (7) days after the conclusion of the hearings, the Committee shall forward to the Dean, Law School Counsel, and the Student copies of the Committee's written findings and applications and of its written report regarding the sanction.

(13) Procedural errors in any aspect of the proceedings shall not be grounds to dismiss the charges unless the Hearing Judge is convinced that the error would prevent the Student from ever obtaining a fair hearing or that there is a substantial likelihood that the outcome of the hearing would be different but for the error. The Hearing Judge shall prepare a written report in support of his or her determination only if the Student or Law School counsel file a Petition for Review of that determination under Section VI.

V. CONFIDENTIALITY, RECORDS, PUBLICITY AND FINALITY

A. All disciplinary procedures and proceedings any records thereof shall be confidential. A videotape recording shall be made of all proceedings at the violation and sanction hearings and shall be preserved for six (6) years. The deliberations of the Committee shall not be videotaped or recorded.

B. The Committee's written findings of fact and application of the TLS Code to the facts found and its written report regarding the sanction shall be maintained by the Committee with the Student's name deleted.

C. After the matter has become final the Dean shall carry out the decision of the Committee and shall post prominently throughout the Law School a notice stating the violation and sanction as determined by the Committee (and upheld upon review), with a brief summary of the facts supporting the violation and sanction sufficient to provide the Law School community reasonable notice of the nature of the violation.

D. A matter shall be considered final after the Committee has made its determination and the time for seeking review has passed without the filing of a Petition for Review or, if a Petition for Review was filed, after completion of the review process.

E. A record of any violation found and the sanction imposed, as well as the Committee's written findings and applications and its written report regarding sanction, shall be maintained in the Student's official Law School file. In addition, the Committee may direct the Registrar to note the violation and sanction on the Student's transcript.

VI. REVIEW

A. Law School Review Panel. There shall be a Law School Review Panel ("Review Panel") composed of five (5) Faculty members and four (4) student members, as follows:

(1) The Faculty members shall be the members of the Administrative and Academic Standing Committee.

(2) The student members shall be other than first year students and shall be appointed by the President of the Student Bar Association at the beginning of each TLS school year.

(3) The Chairperson of the Administrative and Academic Standing Committee shall be the Chairperson of the Review Panel.

B. Grounds for Review

(1) The Student may seek review on the following grounds:

(a) availability of new evidence;

(b) insufficiency of evidence presented to support the committee's determination that a violation occurred;

(c) imposition of excessive sanction; and

(d) procedural errors, rulings on challenges to Committee members or the Hearing Judge, and rulings at the hearing sufficient to require dismissal or a new hearing.

(2) Law School Counsel may seek review on the following grounds:

(a) imposition of inadequate sanction; and

(b) improper dismissal by Hearing Judge for procedural errors.

C. Standards of Review and Remedies.

(1) The Student shall be entitled to a new disciplinary hearing because of new evidence if the Student convinces the Review Panel that (a) the new evidence was not discovered until after the original hearing despite the exercise of reasonable diligence by the Student (and the Student's counsel or advisor) and (b) the new evidence would probably have caused the Committee to determine that no violation occurred had the new evidence been presented at the original hearing.

(2) The Student shall be entitled to a determination that no violation has occurred because of insufficient evidence to support the Committee's determination if the Review Panel concludes that, taking all the evidence presented at the hearing in the light most favorable to the Committee's determination and drawing from the evidence all the reasonable inferences that support the Committee's determination, no reasonable person could determine that a violation was proven by clear and convincing evidence.

(3) The Student shall be entitled to a dismissal of the charges if the Review Panel determines that the Hearing Judge's failure to dismiss for procedural errors under Section IV.D.(13) was clearly erroneous, unless the errors can be cured at a new hearing, in which event a new

hearing shall be held.

(4) The Student shall be entitled to a new hearing if the Review Panel determines that rulings to challenges of Committee members or the Hearing Judge or rulings and the hearing were clearly erroneous.

(5) Law School Counsel shall be entitled to reinstatement of charges that were dismissed by the Hearing Judge for procedural errors under Section IV.D.(13) if the Review Panel determines that the dismissal was clearly erroneous.

(6) The Review Panel may increase or decrease the sanction imposed by the Committee if six (6) members of the Review Panel determine that the sanction imposed was clearly inadequate or clearly excessive. The Review Panel shall give substantial deference to the sanction imposed by the Committee.

D. Procedures for Review.

(1) If either the Student or Law School Counsel seeks review, that party shall file a Petition for Review setting forth with particularity the grounds for review and the specific reasons asserted in support of those grounds. The Petition shall be filed with the Chairperson of the Review Panel within seven (7) days after receiving notice of the sanction imposed by the Committee or of a dismissal for procedural errors by the Hearing Judge.

(2) The Review Panel Chairperson shall schedule a meeting on the Petition as soon as is practicable and shall distribute to the Panel members copies of: (a) the Petition, (b) the Committee's written findings of fact and applications, (c) the Committee's written report regarding the sanction, and (d) the Hearing Judge's report in support

of his or her determination regarding procedural errors if the petition seeks review of that determination.

(3) Except when the Student asserts the availability of new evidence, review shall be based solely upon the videotaped record of the hearings, the Committee's written findings of fact and applications, the Committee's written report regarding the sanction, the Hearing Judge's written report regarding procedural errors, and the presentations of the parties.

(4) The videotaped record of the hearings need not be shown at the Review Panel meeting. The record shall be available in advance of the meeting for viewing by Panel members.

(5) Presentations by the parties shall be made in writing, unless the Review Panel permits oral presentations.

(a) A copy of each written presentation shall be distributed to each Review Panel member at least three (3) days in advance of the meeting.

(b) If oral presentations are permitted, the parties shall each have fifteen (15) minutes for oral presentation.

(c) Even if oral presentations are not permitted, the parties and the Committee shall be available at the time of the meeting for questioning by Review Panel.

(6) The Review Panel shall only consider those grounds and those reasons asserted in support of these grounds that were set forth with particularity in the Petition for Review.

(7) The Review Panel shall promptly notify the Dean, Law School Counsel, the Student, and the Committee Chairperson of its determination. Except as provided below, the Panel's determination shall be final and not subject to review by the plenary Faculty.

(a) If the Panel's determination is that the student is entitled to a new hearing or that the Hearing Judge improperly dismissed the charges, the Committee Chairperson shall schedule a hearing as soon as practicable and the matter shall proceed as provided in this Code.

(b) If the Panel's determination is that the evidence was insufficient to support the Committee's determination that a violation occurred or that the charge should be dismissed for procedural errors, the charge shall be dismissed with prejudice, and no record of the charge or the proceedings shall be made or kept in the Student's file or transcript.

(c) If the sanction imposed by the Committee and upheld by the Panel or imposed by the Panel is either suspension or permanent expulsion of the Student, the sanction shall be automatically reviewed by the plenary Faculty.

(d) Otherwise, the Panel's determination shall be final and the Dean shall thereafter carry out that determination.

(8) Faculty Review of Suspension or Expulsion

(a) When a sanction of suspension or expulsion is imposed by the Committee and upheld by the Review Panel or is imposed by the Review Panel, the matter shall be placed on the agenda for the next regularly scheduled Faculty meeting after the Review Panel's determination.

(b) The plenary Faculty may decrease the sanction only if the decrease is approved by a three-fifths (3/5) vote of the Faculty members present.

(c) Review of the sanction shall be based solely upon the videotaped record of the hearings, the Committee's written findings of fact and applications, the Committee's written report regarding the sanction, a written report by the Review Panel regarding sanctions, and the presentations of the parties. The Faculty shall give substantial deference to the sanction imposed by the Committee and/or Review Panel.

(d) The videotaped record of the hearings shall not be shown, except for good cause, at the Faculty meeting when the sanction is reviewed. The record shall be available in advance of the meeting for viewing by Faculty members and they are encouraged to view the record.

(e) Presentations by Law School Counsel and the Student may be made in writing, or orally, or both. A copy of each written presentation shall be distributed to each Faculty member at least three (3) days in advance of the meeting. If oral presentations are made, the parties shall each have fifteen (15) minutes for oral presentation. Reasonable limitations may be imposed on questioning of the parties and discussion by individual Faculty members.

. . .

APPENDIX F

Temple University School of Law
Report of the Law School
Discipline Committee

Pursuant to Article IV of the Code of Student Conduct, a panel of the Law School Discipline Committee, consisting of four student members and three faculty members, was convened on Monday, October 4, 1994, for the purpose of hearing charges with violating two paragraphs of Article II of the Code of Student Conduct which provides that "It shall be a violation of this code for a TLS student knowingly to do or to attempt to do or to assist in any of the following:

> J. communicate to a member of the Faculty or Administration serious falsehoods concerning official business of the Law School,....
>
> R. ....make any seriously intended threat of bodily harm or commit any act of physical violence or intimidation toward a member of the Law School community;...."

Pursuant to Paragraph D(10)(a) of Article IV of the Code of Student Conduct, which provides that, "....the Committee shall decide that a violation has occurred only if five (5) of the members.....determine that a violation was proven by clear and convincing evidence", the panel announced after deliberation the following decisions:

On the charge of violating Paragraph J of Article II: **Guilty**.

On the charge of violating Paragraph R of Article II: **Not Guilty**.

With regard to the finding of a violation of Paragraph J of Article II, the panel made the following findings of fact: On May 5, 1994, in response to the invitation of Dean Reinstein to explain an incident which occurred two days earlier, the law student told the Dean that the person he sprayed with pepper gas has stated to him (the law student) that he had a knife and reached inside his jacket in a manner indicating that there was a knife. Clear and convincing evidence was introduced that no statement about a knife was made to the law student, and no gesture of reaching inside his jacket was made by the man sprayed by the law student which could reasonably have indicated that there was a knife. There was in fact no knife. The false statements were serious. The Dean's attempt to ascertain the facts of the May 3 incident constituted official business of the Law School.

Pursuant to Paragraph D(11) of Article IV of the Code of Student Conduct, a second hearing was convened on Monday, October 10, and continued on Monday, October 17, 1994, at the conclusion of which the panel by majority vote determined the sanction to be imposed. The panel voted that the law student should be suspended from the Law School until January, 1997, and that to re-enter the Law School at that time, the law student must comply with the following conditions: 1. During his suspension, the law student must obtain weekly professional psychological counseling totalling not less than 100 hours, not at the expense of the Law School or Temple University. 2. During his suspension, the law student must perform not less than 100 hours of community service, appropriate service to be determined jointly by the law student and the most senior member of the Law School

faculty or his designee. 3. Upon his return to the Law School, the law student will remain on probation for as long as he remains a law student.

In deciding on the appropriate sanction, the panel considered the factual circumstances of the violation, the self-serving nature of the violation, the seriousness of the violation by an aspiring lawyer, and the character of the law student as described by witnesses presented by counsel for the Law School and for the law student. The panel considered that this is the law student's first violation of the code of Student Conduct.

Respectfully submitted, pursuant to paragraphs D(10)-(12) of Article IV of the Code of Student Conduct.

/s/ Jan C. Ting

Jan C. Ting,
Professor of Law
and Acting Chairperson,
Law School Discipline Committee

Thursday, October 20, 1994

APPENDIX G

Temple University Law School
Law School Review Panel

IN THE MATTER OF LINCOLN HERBERT

REPORT

1. On October 31, 1994, Lincoln Herbert filed a Petition for Review of a finding by the Law School Discipline Committee ("Committee") that he had violated Article II.J. of the Law School Code of Student Conduct ("Code") and of a penalty imposed upon him as a result of such a finding.

2. October 31, 1994, Professor David Sonenshein, on behalf of Temple Law School, filed a Petition for Review of the Committee's sanction upon Mr. Herbert.

3. The Law School Review Panel ("Panel") has received and reviewed the following documents:

a. Report of Law School Discipline Committee

b. Opinion of the Hearing Judge

c. Videotaped transcripts of the hearings below

d. Petition for Review of Lincoln Herbert

e. Petition for Review of Temple Law School

f. Law School Response to Herbert Petition for

Review (with Exhibits)

g. Motion by Lincoln Herbert Requesting Recusal of Panel Members

h. Amended Petition for Review by Lincoln Herbert (with 20 Exhibits)

i. Written Submission of Temple Law School

j. Memorandum of Law of Lincoln Herbert

k. Letter/Motion of Lincoln Herbert Regarding Certain Procedural Matters

4. On December 2, 1994, the Panel held the meeting required by Section VI.D.(2) of the Code. At that meeting, both Mr. Herbert and Professor David Sonenshein made oral presentations in accordance with Section VI.D.(5) of the Code.

5. The Panel, having considered the documents described above and the oral presentations of the parties to this matter, determines as follows with regard to the Petition for Review of Lincoln Herbert:

(a) The Code Section VI.B(1)(a) grounds for review alleged by Mr. Herbert (availability of new evidence) do not meet the standard for review required by Code Section VI.C(1).

(b) The Code Section VI.B(1)(b) grounds for review alleged by Mr. Herbert (insufficiency of evidence) do not meet the standard of review required by Code Section VI.C(2).

(c) The Code Section VI.B(1)(d) grounds for

review alleged by Mr. Herbert (procedural errors) do not meet the standard of review required by Code Section VI.C(3).

(d) The issue of whether Mr. Herbert's counsel at the proceedings below was ineffective is not properly before us as a ground for review.

Accordingly, Mr. Herbert's Petition with regard to the above cited grounds is Denied.

(e) With regard the Code Section VI.B(1)(c) grounds for review alleged by Mr. Herbert (excessive sanction), we find that the sanction of 100 hours of psychiatric treatment imposed by the Committee is clearly excessive. Accordingly, it is struck and replaced by the following:

> "By March 1, 1995, Mr. Herbert must obtain, at his own expense, a psychiatric evaluation from a duly licensed psychiatrist. As a condition of reinstatement from his suspension, Mr. Herbert must satisfy the Administrative Committee that he has obtained said evaluation and has followed or is following the treatment recommendations, if any, set forth in such an evaluation."

To this extent, Mr. Herbert's Petition for Review with regard to the above cited grounds is Granted.

With regard to the remaining sanctions imposed by the Committee (suspension, community service and probation upon reinstatement) we find that they bear a reasonable relationship to the severity of the violation and were not clearly inadequate or clearly excessive.

Accordingly, Mr. Herbert's Petition for Review is Denied with regard to the remaining sanctions imposed by the Committee.

6. In view of the findings set forth in paragraph 6(e) of this Report, the Law School's Petition for Review is Denied.

7. In accordance with the Code, this concludes the Panel's proceedings in this matter.

FOR THE LAW SCHOOL REVIEW PANEL:

/s/ Rafael A. Porrata-Doria, Jr.

Rafael A. Porrata-Doria, Jr.
Professor of Law
Chair, Law School Review Panel

APPENDIX H

ANDERSON
1150 Warwick Furnace Road
Glenmoore, PA 19343
(610) 469-8636

March 22, 1997

Mr. Richard P. Myers, Esquire
Paul Reich & Myers, PC
1608 Walnut Street, Suite 500
Philadelphia, PA 19103

Dear Mr. Myers,

On Mach 21, 1997 your client Lincoln F. Herbert was interviewed and tested with the polygraph. At issue was Mr. Herbert's use of pepper gas on May 3, 1994 and a subsequent interview on May 5, 1994 by Dean Reinstein of the Temple Law School.

During the polygraph process these issue questions were asked of Herbert. (Answer in parenthesis.)

1. Did the man who accosted you May 3, 1994 outside the Temple Law School tell you he had a knife? (yes)

2. Did the man who accosted you May 3, 1994 outside the Temple Law School reach inside his jacket in manner suggesting he had a knife? (Yes)

3. Did you purposefully lie to Dean Reinstein May 5, 1994 by telling him the man who accosted you said he had a knife? (No)

4. Did you purposefully lie to Dean Reinstein May 5, 1994 by telling him the man who accosted you reached inside his jacket in a manner which suggested yo you he had a knife? (No)

The emotional responses recorded as Herbert answered these issue questions were compared to those recorded as he answered certain control questions. These controls were derived by me from the pre-test interview and my own experience. Based on this comparison it is my opinion Herbert was not deceptive (was truthful) when he answered the above issue questions as he did.

The charts produced along with the related papers are here retained in the attorney-client privilege as agreed. They are available for display and explanation by me at your direction. A copy of my resume is attached.

Very truly yours,

\s\ William B. Anderson
William B. Anderson

APPENDIX I

ROBERT V. DE SILVERIO
Suite 2109, Oakwood at the Windsor
1700 Benjamin Franklin Parkway
Philadelphia, Pennsylvania 19103

Telephone (215) 636-9005
Fax (215) 636-9017

November 2, 1996

School of Law
Temple University
Philadelphia, PA

Re: Lincoln Herbert

I conducted a psychiatric examination of Mr. Herbert on March 10, 1995. He informed me that he had been suspended as a student at the law school and was requresting the examination in compliance with a directive from the school as one of the conditions for reinstatement.

Mr. Herbert, 37, was in his third year at the law school and when he receive a 2-½ year suspension after being found guiltiy of having lied to the law school dean in regard to circumstances surrounding an incident on campus, on May 3, 1994.

In regard to the incident, Mr. Herbert said that he was returning to the law school after dark and was approached from behind on the school steps by a man demanding money. He said he did not respond and when the man told him he had a knife, reached under his jacket and rushed toward him, he sprayed him with pepper gas, stunning him. Mr. Herbert then said he went into the building and asked a security guard to call campus police. He went on to relate

that the man then appeared inside the building shouting obscenities and threatening him and he sprayed him again, after which the man fled. Mr. Herbert said he subsequently gave statements to both the campus police and the Philadelphia Police.

Mr. Herbert said that two days later the law school dean suspended him from school and explained the apparent breach in due process of the basis of his judgment that Mr. Herbert was a "clear and present danger" to the law school community. Some 47 days later, he was charged with knowingly committing an act of violence (a law school clerk was said to have been affected by lingering pepper spray) and lying about having been accosted and threatened.

Mr. Herbert said that he was subsequently acquitted, by a disciplinary committee, of the charge of violence but was found guilty of lying to the dean about the circumstances of the incident.

Mr. Herbert said that in the weeks precedeing the incident, the dean had been demeaning him and a student group, Western Heritage Society, a conservative campus organization which he founded and was president of, at the time. In this connection he siad the dean wrot a "letter to the law school community" in which he denounced Mr. Herbert and the organization, based on a speech Mr. Herbert had written. The letter, he said, was later published int he student publication, "Class Action" but Mr. Herbert was denied an opportunity to submit a response. The group was said to be vilified because of its position against "political correctness" on campus.

A month earlier, Mr. Herbert was honored with a student activism award presented to him at a Harvard University conference on "The First Amendment and the Western

Tradition" in which he was an invited panelist.

Personal History:

Mr. Herbert is the oldest of four children raised in Milwaukee, WI, whose parents separated [sic] he was 19. His sister, 34 is an elementary school teacher. His brother 33, obtained a master's degree in journalism from Columbia University in 1994 and was hired by a newspaper in Johannesburg, South Africa, the following year. His brother. 31 is an attorney who graduated from the Southern Illinois Law School in 1991. Mr. Herbert graduated from high school at age 16. He then attended DuPage University as a pre-medical major, for 2 years after which he transferred to U.C.L.A. as a history major. He completed his courses in 1984 and was awarded a B.A. in 1987. He spent his senior year at the University of London Modern European History and German. After completing college he taught English in Germany for 5 years. He began Temple University School of Law in 1991 and completed 2 years full time and 1 year part-time. He explained that the change to part-time was necessitated for financial reasons. He said he had anticipated completing law school in 1995.

Family history was negative for psychiatric illness.

Mental Status Examination:

Mr. Herbert appeared neatly groomed and attired. Speech was logical and coherent. He manifested no mood disturbance, hallucinations or delusions. Fund of knowledge was consistent with intellectual ability in the well above average range. Ability for abstract thinking was unimpaired.

In conclusion, Mr. Herbert manifested no clinical evidence of mental illness. Moreover, no basis was found for the

requirement of a psychiatric examination, which appeared inconsistent with having been found guilty of an offense. If he was seriously thought to have had a psychiatric disturbance at the time of the offense, it seems unfair that he was not informed of it so that, at the very least, he would have had an opportunity to consider offering a psychiatric defense.

Sincerely,

/s/ Robert V. De Silverio, M.D.